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Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 342.

KRAUSS BROTHERS LUMBER COMPANY,

Petitioner,

—against—

ANDREW W. MELLON, Director General of Railroads as Agent under Section 206, Transportation Act of 1920; MOBILE & OHIO RAILROAD COMPANY and ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER.

Statement of the Case.

A writ of certiorari was issued in this case under an order containing, among other things, a requirement

> "* * * that the argument be limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn."

The case below is reported at 18 F. (2d) 369.

The litigation in the present case started as a formal reparation proceeding before the Interstate Commerce Commission. Recovery of demurrage charges in the amount of $10,356 was sought. These charges had been collected because of delay or failure of the railroads themselves in respect to carrying out duly-given reconsignment instructions. There were no applicable tariff provisions specifically authorizing imposition of demurrage charges on account of embargo delays, and the Commission uniformly in such cases denied their legality. The defense was based upon the single proposition that a common-law right, superior to the Commission's power, had enabled the carriers to deny reconsignment until embargoes were lifted, and, because of this common-law right, the Commission had no power either to deny the imposition of demurrage charges for the intervening delay or to order their repayment.

The Commission's findings show that the case was narrowed down so that the only issue upon which the Commission was asked to decide was the issue of law concerning their power to order reparation, all other points being admitted or waived. The findings and order show that, upon the Commission's decision of this law point in petitioner's favor, a voluntary stipulation was filed showing the amounts recoverable if the Commission were eventually sustained in its determination of the law.

The case was carried from the Commission into the United States District Court for the Northern District of Alabama by a complaint filed pursuant to Section 16 of the Interstate Commerce Act. The findings and order

were duly attached to the complaint as a part thereof, and were as follows:*

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complanant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders

* Headings omitted in this brief. Italics wherever used in this brief, do not appear in the original text unless so indicated herein.

were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the

latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; *Wood* v. *N. Y. P. & N. R. R. Co.*, 53 I. C. C. 183; *Atlantic Lumber Co.* v. *N. Y. P. & N. R. R. Co.*, 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us.

The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly responsible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D. 1922.

* * *

It appearing, That on March 2nd, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in ques-

tion we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest:

Defendants	Amounts	With Interest From
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest hereon at the rate of 6 per cent. per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

Upon the trial of the case in Court no objection was made to introducing in evidence the findings and order at their face value.

The findings and order having been put in evidence, together with proof of non-payment, the petitioner closed its case. Thereupon the respondents offered, and, over petitioner's due objection, there was admitted in evidence certified copies of the records in several proceedings before the Commission, including numerous very large exhibits from the files of the Commission. Some of these records set forth the proceeding in which the reparation order there had been made which is here in suit. Others dealt only with subsequent hearings which had arisen out of an effort of the Commission, when the subject-matter of the present suit had already been duly lodged in the District Court, to reopen the case and consider new theories of law concerning it.

No evidence other than the Commission records was offered by respondents in the District Court, except an oral stipulation that only $245.00 of the entire $10,356.00 ordered to be repaid, had ever been received by respondent Mobile & Ohio Railroad Company and evidence that only $180.00 of such total sum ever had been received by respondent Alabama Great Southern Railroad Company (R., 58).

Both sides moved for a directed verdict which was given by the Court in favor of respondents, and due exception was reserved by petitioner. Thereafter, by writ of error, the action of the trial Court was duly carried up for review by the United States Circuit Court of Appeals for the Fifth Circuit. The errors set forth were the directing of a verdict for respondents and refusing to direct a verdict for petitioner.

The waiver before the Commission of all issues except the issue concerning the Commission's power to order reparation, and the respondents' refraining from timely objection to the findings and order when offered in Court as evidence, seemed to limit the case to the controversy disclosed upon the face of the findings. Therefore, in preparation of the bill of exceptions, the circumstances seemed to require the application of those principles set forth in Subsection 2 of Rule "7", "Revised Rules of the Supreme Court of the United States", which, under the heading, "BILLS OF EXCEPTION * * * OMISSION OF UNNECESSARY EVIDENCE", provides that: "The Judges of the district courts in allowing bills of exception shall give effect to the following rules:

> "2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

Obviously the prima facie case established by the findings and orders must have prevented direction of a verdict against petitioner on the evidence, for at least a jury issue would have arisen out of any denial of the findings.

Therefore, pursuant to the rule aforementioned, a bill of exceptions was prepared, approved and filed which fully recited all the evidence, showing the identity, subject-matter and introduction of each and every exhibit and containing the usual statement, *"This was all the*

evidence in the case". The bill disclosed, however, that some of the exhibits which had been thus mentioned, had not been fully set out but had been omitted—namely (R., 58):

1. The original pleadings before the Commission.

2. The testimony and all exhibits taken and filed in the Commission proceedings. (These were exceedingly voluminous.)

3. Petition for reopening the case. (Filed after the subject-matter had been placed in the District Court by the present suit.)

4. Correspondence of the Director General with the Commission leading up to the attempted reopening.

5. Testimony and exhibits in proceedings subsequent to the attempted reopening.

The Circuit Court of Appeals affirmed the judgment of the lower Court purely on the arbitrary rule that unless all the exhibits were shown to be embraced in the bill of exceptions the Court would decline to consider the merits of the case.

Believing such an unjust and wholly unnecessary decision in violation of Rule 7 of the United States Supreme Court, petitioner sought and obtained a writ of certiorari.

Assigned Errors Which Will Be Urged.

This appeal is limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn.

The errors assigned in the Circuit Court of Appeals, and there urged, were the directing of a verdict for

respondents and the refusal to direct a verdict for petitioner.

SUMMARY AND ARGUMENT.

1. The finding of facts and order constituted "*prima facie* evidence".

Interstate Commerce Act, Sec. 16.

2. The term, "*prima facie evidence*", has in Federal law a well-defined meaning.

Kelly v. *Jackson*, 31 U. S. (6 Pet.) 622, 631.

3. Unless "*prima facie* evidence" is "contradicted or disproved by controlling evidence on the part of the defendant", the plaintiff is entitled to recover.

Kelly v. *Jackson, supra.*

4. Furthermore, the conclusions of a commission such as the Interstate Commerce Commission, "depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor".

Illinois Cent. R. Co. v. *I. C. C.*, 206 U. S. 441;
Tilghman v. *Proctor*, 125 U. S. 136, 149.

5. The findings and order accordingly made out a complete case, rebuttable only by controlling evidence.

Spiller v. *A. T. & S. F. R. Co.*, 253 U. S. 117, 127, 131-2;
Mills v. *L. V. R. Co.*, 238 U. S. 473;
Cases cited above.

6. Conflicting evidence could only have raised a jury issue and could not under any circumstances have warranted the direction of a verdict for respondents.

7. It is clear, therefore, that only some defect in the legal theory of the case, and not insufficient evidence, could have warranted the Court's charge.

8. Failure to object to evidence constitutes a waiver of defects and, in the case of documents, admits them at their face value.

9. If the findings and order had not actually been made by the Commission but only by members of the Commission who were acting outside the scope of their official powers, then the statutory provisions making official findings of the Commission admissible would have had no application.

Church v. *Hubbart*, 2 Cranch 187;
cf. *Vitelli & Son* v. *U. S.*, 250 U. S. 355.

10. Whether the findings and order were genuine and admissible might have been raised as a preliminary question for the Judge; but, by electing to waive such a preliminary inquiry, the respondents further showed their intention to confine their defense to the single issue apparent upon the face of the findings.

Kendall v. *May*, 10 Allen (Mass.) 59, 65.

11. Furthermore, only the issues actually contested before the Commission were in litigation, all else having been admitted or waived.

T. & P. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435;

M. K. & T. R. Co. v. *Harriman*, 227 U. S. 657, 668;
L. & N. R. Co. v. *Ohio Valley Tie Co.*, 242 U. S. 288.

12. The bill of exceptions recites that it contains all of the evidence in the case and is duly approved.

13. It was the duty of the District Judge to require condensation of the record by eliminating therefrom irrelevant matter.

Supreme Court Rule 7, subsection 2.

14. It is conclusively shown that no evidence which would have cast any light upon any issue in the case was omitted from the bill of exceptions.

15. The Supreme Court no longer favors purely arbitrary requirements in respect to bills of exceptions.

McDonald v. *Maxwell*, 47 S. Ct. 487;
Barber Asphalt Pav. Co. v. *Standard A. & R. Co.*, 48 S. Ct. 183;
Supreme Court Rule 7, subsection 2;
cf. Equity Rule 75 (b).

16. All those proceedings in the Commission which were based upon an effort to reopen the case were void for want of jurisdiction inasmuch as the subject-matter had previously become lodged exclusively in the District Court by the filing of the present suit.

Minneapolis & S. P. R. Co. v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 586.

17. Even in the District Court the three parties respondent openly agreed among themselves and with petitioner concerning the division, among themselves, of the wrongfully-acquired demurrage charges for the recovery of which this suit is maintained, thereby further admitting the facts in the case.

Bill of Exceptions (R., 57 and 77-78).

18. The parties having elected to rest their case upon rulings of law, it would be proper for judgment to be rendered against all of them in such amounts as the Court deems proper.

Beuttell v. *Magone,* 157 U. S. 154;
Interstate Commerce Act, Sec. 16.

The Interstate Commerce Act (Section 16) provides that the findings of fact and order in a reparation case shall constitute "*prima facie* evidence". In Federal law the term, "*prima facie* evidence", has been given a well-recognized meaning. It is evidence which a jury may not disregard and which is conclusive unless and until controverted or disproved "by controlling evidence on the part of the defendant", as declared by the Court in *Kelly* v. *Jackson,* 31 U. S. (6 Pet.) 622, 631, wherein the Court approved a charge "that the plaintiff had given *prima facie* evidence in support of his case, and such as was conclusive if uncontradicted and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff is entitled to recover"; while the Court disapproved a charge that "the evidence upon the one side or the other should not be submitted to the jury as *prima facie* or presumptive

evidence, either for or against a delivery; but the whole evidence together, and from the whole, determine whether or not the deed was delivered". The Court in this connection (Story, *J.*), said:

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No Judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances without any rebutting evidence they disregard it."

This Court, in *Illionis Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, declared as follows:

> "The findings of the Commission are made by law *prima facie* true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."

Furthermore, the waivers and admissions made in the trial of this case before the Commission are binding. (*L. & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288; *T. & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435; *M. K. & T. R. Co.* v. *Harriman Bros.*, 227 U. S. 657, 668.)

The Commission declared that there was involved in the case only the question of its power to regulate what the carriers believed to be a practice absolutely within their common-law rights. It found for the shipper and

requested that the amount of money involved in the case be stipulated. When the stipulation was made it became binding on the Director General.

In the District Court the defendants not only made no resistance to the findings and order but actually proved in open court what portion of the disputed money had been received by each of them. This was, of course, an admission that they had received the money concerning which the Commission had rendered its findings and order.

The effect of admitting "*prima facie* evidence" without objection is discussed in *Kendall* v. *May,* 10 Allen (Mass.) 59, 65, where the Court said as follows:

> "The auditor having made his report, it is made by statute *prima facie* evidence, and nothing more. The finding as to this fact of the capacity of the defendant to testify is not conclusive, but *prima facie* only.
>
> In respect to the other facts found by the auditor, the report was to be submitted to the jury, and the evidence to contradict the report must be addressed to them. But it was not so as to this fact; for the capacity of a witness to testify is not a fact that is ever submitted to the jury, but is always decided by the Court.
>
> It would be impracticable to submit these collateral issues to the jury. The auditor's finding on the point of capacity was to be affirmed or disaffirmed in this case by the Judge, upon evidence to be presented to him. If it was affirmed, then the report was to be sent to the jury * * *."

Finally, the case of *Barber Asphalt Paving Company* v. *Standard Asphalt & Rubber Company,* 48 S. Ct. 183, is believed to be controlling. Although it was an equity

case, nevertheless Rule 7, subsection 2, applicable to the present case, and Equity Rule 75 (b), applicable to that case, are almost exactly alike—so much alike that their similarity cannot be merely accidental. Each such rule requires that the evidence be "condensed" and set forth in "narrative form". The law rule says, "Only so much of the evidence shall be embraced * * * as may be necessary to present clearly the questions of law * * *"; while the equity rule says, "The evidence shall not be set forth in full * * * all parts not essential * * * being omitted." The general structure of the two rules is the same and in meaning they are obviously identical.

In the Barber case a review *of all the evidence* was sought by appeal from the final decree. Yet the Court held that counsel had been guilty of bad practice in embracing all of the exhibits in the statement.

In the case of *McDonald* v. *Maxwell*, 47 S. Ct. 487, it appeared that the Appellate Court, as in the present case, had declined to pass upon the merits because certain facts had not been set out in a bill of exceptions, as always theretofore required by the Appellate Court. The action of the Appellate Court was reversed by the Supreme Court on the ground that the record was adequate for all practical purposes.

For the reasons aforestated, it is respectfully asked that the judgment of the Circuit Court of Appeals be reversed.

BRENTON K. FISK,
Attorney for Petitioner.

HARRY S. ELKINS,
J. P. MUDD,
Of Counsel.

Office Supreme Court, U. S.
FILED
AUG 26 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 342.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner,

—against—

ANDREW W. MELLON, Director General of Railroads, as Agent, and others,
Respondents.

BRIEF OF PETITIONER IN REBUTTAL, SUPPORTING PETITION FOR CERTIORARI.

BRENTON K. FISK,
Attorney for Petitioner.

IN THE

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Petitioner,

—against—

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Respondents.

BRIEF OF PETITIONER IN REBUTTAL, SUPPORTING PETITION FOR CERTIORARI.

A brief in rebuttal is filed in this case for the purpose of clarifying two of the issues. Petitioner states that a well-recognized administrative practice, enforced by the Interstate Commerce Commission, forbade the assessment of demurrage charges for embargo delays except in cases where applicable tariff provisions specifically stipulated for such charges. The respondent questions the accuracy of the statement. Brushing aside mere differences in terminology, the statement of the Commission on this point contains its own corroboration, reading as follows (R. 63):

> "We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment case, 47 I. C. C., 590, 634; *Wood* v.

N. Y. P. & N. R. R. Co., 53 I. C. C., 183; *Atlantic Lumber Co.* v. *N. Y. P. & N. R. R. Co.*, 57 I. C. C., 129."

Respondent further argues that there is no *right* to reconsign freight—that reconsignment is a mere *privilege*. To claim the benefit of a tariff provision is not to claim a mere privilege. Under laws forbidding discrimination, tariff provisions must be uniformly applied and it is a shipper's lawful right to require that he be given the fullest benefit of any and every tariff provision.

It is clear that the only problem before the Commission in this case was to determine the extent and effect of a certain general rule of tariff construction. The parties were requested by the Commission to agree upon the charges collected of shipper in violation of this rule, which the Commission, in its formal opinion, had just declared to be law. The opinion discloses that the Commission had limited its consideration of the case to this single question of tariff construction—namely, whether the existence of an embargo will justify a refusal to comply with the provisions of a reconsigning tariff when no mention of embargoes as limitations upon reconsigning rights is contained in the tariffs. The narrowing of the case is pointedly disclosed by the following sentence in the findings (R. 63):

> "Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin."

Even if there were no such direct admission, there is certainly an equivalent admission to be implied from the stipulation that charges had been collected of shipper contrary to the rule of tariff construction above stated.

In petitioner's judgment, the mere existence of applicable reconsigning tariffs and the absence of any mention of embargoes as limitations upon them is all that has to appear in the record concerning tariff provisions. The case involves no fine shades of meaning in the phraseology of the several tariffs or in any embargo order. Anti-discrimination laws require that tariffs receive certainty in construction and uniformity in application. Even if some of the tariffs held out reconsignment merely as a "favor" to be granted or refused at the carrier's convenience or pleasure, nevertheless the dominating influence of anti-discrimination laws, which impose rules of definiteness and certainty, require that such provisions be construed as creating tariff rights to which all shippers may have equal benefit. It is not lawfully within the power of a carrier to grant valuable privileges to some and withhold them from others. It is for the Commission to standardize by its rules and decisions the exceptions which will legalize a refusal to comply with the terms of a tariff.

One of the rules of certainty which were applicable to the present case was, as petitioner maintains, the rule which the Commission has always applied and which is stated in the first of the foregoing quotations.

Petitioner believes that the record presents the issues adequately for review on appeal.

BRENTON K. FISK,
Attorney for Petitioner.

FILED
MAR 7 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1927—No. 342.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner,

—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN REBUTTAL FOR THE PETITIONER.

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HARRY S. ELKINS,
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Supreme Court of the United States.

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Respondents.

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BRIEF IN REBUTTAL FOR THE PETITIONER.

The respondents' brief seems to call for a clarifying statement on one or two points.

It has at all times been the petitioner's contention that the respondents' exhibits were irrelevant and that they had no proper place in the bill of exceptions. The respondents held a contrary opinion. In the preparation of the bill of exceptions the trial Judge, together with the attorneys for the parties, put into effect the plan, embodied in the record and recited in the respondents' brief, whereby these original exhibits were transmitted with the record to the Court of Appeals. A prime motive which

animated the petitioner to resist the inclusion of these exhibits in the bill of exceptions and printed record was, as the respondents relate, the saving of expense in preparing the record. The respondents endeavored to be fair and there is no desire on the part of the petitioner to derive a handicap from the omissions.

The petitioner rests its case upon the proposition that the printed record shows itself to be fully adequate for a decision of the present appeal.

The respondents jointly, and not severally, made the successful motion on which a verdict for all defendants was directed by the Court. Jointly, therefore, they must show themselves entitled to prevail in the present appeal.

The sequence of some of the events in this case will aid in showing, it is believed, the adequacy of the present record. It is shown that the following steps have been taken:

First, the petitioner complained to the Commission that on reconsigned shipments there had been imposed upon him demurrage charges which were unauthorized by the applicable reconsignment tariffs.

Second, the respondents replied that no reconsignment provisions of any tariff had been applicable for the reason that common-law authority, in connection with existing embargoes, had been superior to the tariff provisions. Consequently the case could not be decided upon tariff provisions.

Third, the case was expressly narrowed down to this single question of law.

Fourth, the Commission found the case governed by the reconsignment tariff provisions and requested the parties to agree upon the charges

which should be refunded if the Commission's views were sustained.

Fifth, an agreement was reached, a stipulation was filed and the Commission therefrom made its reparation order.

Sixth, an appeal of the case has now reached the Supreme Court.

Seventh, the respondents now insist that the case cannot be decided without construing the provisions of the several reconsignment tariffs which heretofore they have renounced and which may, perhaps, be found somewhere in the Commission's record.

From the Commission's report of the proceedings, if the report may be deemed reliable, it is clear that the respondents did not defend upon this additional ground which they now assert.

BRENTON K. FISK,
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HARRY S. ELKINS,
J. P. MUDD,
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55003—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

This is a suit to enforce orders of the Interstate Commerce Commission awarding reparation for $10,356 with interest (Rec. p. 66.) The petitioner between November 1, 1917, and January 11, 1918, made numerous shipments of lumber from various points in Mississippi, Alabama, Louisiana, and Texas consigned to itself at Chattanooga, Tenn., Meridian, Miss., and Jackson, Tenn. (R. 61.) Upon arrival, orders were given to reconsign the shipments to various destinations in the East, the principal market of the petitioner. (R. 61.)

Because these destinations were embargoed the reconsignment instructions were refused by the respondents and demurrage assessed for the detention of the cars while awaiting further instructions. (R.

61.) The Commission held that there was no authority to collect the demurrage charges[1] because the tariffs publishing the reconsignment rules did not have a rule prohibiting reconsignment to embargoed destinations. The Commission, therefore, ordered the demurrage refunded. (R. 64.)

The respondents contend that the demurrage was properly assessed because reconsignment is a privilege (not a right) which, if availed of, attaches as of the date of the original shipment, and therefore is subject to all rights, privileges, and disabilities pertaining to the original shipment, except such as are specifically waived by the tariffs permitting reconsignment. Consequently they may refuse to reconsign to a destination which is embargoed against shipments from the original point of origin without so stating in their tariffs governng reconsignment, and assess demurrage charges for detention of the cars while awaiting disposition, just as they may refuse original shipments, if billed to an embargoed destination, and collect demurrage charges while the cars are awaiting instructions, without publishing a rule in the tariffs governing the original shipments that cars will not be accepted to embargoed points.

The petitioner is in error in stating, on page 2, that the respondents "have disregarded a well-

[1] The demurrage rules and charges applied to these shipments were those published for general application, and were contained in different tariffs from those publishing the reconsignment rules and charges. The demurrage tariffs are not in question here.

known and generally recognized administrative practice upon which the Commission has uniformly insisted." See also pages 3 and 10. No "administrative practice" of the Commission is involved. This is a question of the legal rights and obligations of the respondents under general principles of law and under their tariffs.

The following additional questions were raised below. It was contended by respondent Mellon: (1) that even though the demurrage was illegally assessed, he can not be held liable for that portion which accrued for detention prior to Federal control, and which he collected for the railroad companies and paid over to them in his final settlement with them; and (2) that he, as a branch of the United States government, is not liable for costs and attorneys fees in the event the order of the Commission should be held valid.

It was also contended by the Alabama Great Southern Railroad Company that since it was not a party defendant in the proceedings before the Commission any order requiring it to pay any portion of the reparation is null and void.

A discussion of these questions will not be of any assistance in determining whether the petition for certiorari should be granted, but they are stated so that the Court may have before it a full statement of the issues in the case.

A brief consideration of the merits will show that the judgment of the District Court, that the orders

of the Commission are null and void, which was affirmed by the Court of Appeals is corrected. The reasons for the action of the Court of Appeals are immaterial.

Petitioner states (pages 8, 9, 16, and 18) that the portion of the record which was not printed, but was sent up in the original form to the Court of Appeals, is irrelevant and immaterial. That portion of the record is material and relevant, and was offered in evidence in the District Court to place before the Court the entire record which was before the Commission.

BRIEF OF ARGUMENT

Demurrage charges were legally assessed, and the Commission's orders are void

Record 58, 61–63, *Exhibit* 8.

Dietz Lumber Co. v. *A. T. & S. F. Ry.*, 22 I. C. C. 75.

Cedar Hill Coal & Coke Co. v. *C. & S. Ry.*, 17 I. C. C. 479.

Sou. Rwy. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297.

Wood v. *N. Y. P. & N. R. Co.*, 53 I. C. C. 183.

Carolina Portland Cement Co. v. *Director General*, 83 I. C. C. 388.

Murray v. *Director General*, 69 I. C. C. 477.

Brennan Packing Co. v. *Director General*, 77 I. C. C. 307.

Atlantic Refining Co. v. *Director General*, 57 I. C. C. 627.

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Kaw Boiler Co. v. *Director General,* 83 I. C. C. 339.

DuPont v. *Director General,* 59 I. C. C. 659.

American Paper & Pulp Association v. *B. & O. R. R.,* 41 I. C. C. 506.

North Packing & Provision Co. v. *Director General,* 73 I. C. C. 749.

Cannon Mfg. Co. v. *Sou. Rwy. Co.,* 56 I. C. C. 128.

C. & A. Ry. v. *Kirby,* 225 U. S. 155.

Davis V. Cornwell, 264 U. S. 560.

Davis v. *Henderson,* 266 U. S. 92

C. & O. Ry. v. *W. C. K. Co.,* 270 U. S. 260.

Cleveland Cooperage Co. v. *Director General,* 57 I. C. C. 423.

Lafayette Box Board Co. v. *Director General,* 59 I. C. C. 105.

ARGUMENT

The demurrage charges were legally assessed, and the Commission's orders are void

Since it is admitted that the embargoes were reasonable and necessary (R. 62), the only question is the legality of the demurrage charges which were collected for the detention of the cars at the reconsigning points while they were being held for further instructions or awaiting the lifting of the embargoes.

The respondents contend that reconsignment is a privilege (not a right) which if availed of attaches as of the date of the original shipment, and,

therefore, is subject to all rights, privileges, and disabilities pertaining to the original shipment, except such as are specifically waived by the tariffs permitting this reconsignment. Consequently they may refuse to reconsign to a destination which is embargoed against shipments from the original point of origin, without so stating in their tariffs governing reconsignment, while awaiting disposition, just as they may refuse the original shipments if billed to an embargoed destination, and collect demurrage while the cars are held awaiting instructions, without any specific provisions in their tariffs that shipments will not be accepted to embargoed points.

The Commission held that the demurrage was illegal because the obligation to accept original shipments is governed by general principles of law, while the obligation to reconsign is dependent upon the construction of the rules in the tariffs permitting the reconsignment, and that if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention, since the embargo is a disability of the carrier. (R. 63–64.)

In this case the embargoes were laid before any of the cars were offered for shipment at the original shipping points. The petitioner knew when it tendered the shipments at the original points of origin that the entire eastern territory, where its principal market was located, was embargoed.

The embargoes remained in effect all during the transportation to the reconsigning points. They were still in existence when the orders for reconsigning were given, and they continued for some time thereafter. Embargoes were also in force against shipments from the reconsigning points as original points of origin to the final destinations in the East. In other words, the shipments could not have been made either from the original points of origin or locally from the points of reconsignment to the final destinations. (R. 58, 61–62.)

These facts should be kept in mind in reading the following discussion.

It is settled that reconsignment is not a right which a shipper may demand but only a privilege that becomes available to him when extended by the carrier in its tariffs.

In *Dietz Lumber Co.* v. *A., T. & S. F. Ry.*, 22 I. C. C. 75, 76, the Commission says:

> The reconsigning privilege * * * is not one to be demanded by the public as a matter of right, but it is a concession voluntarily extended by the carriers * * *.

In *Cedar Hill Coal & Coke Co.* v. *C. & S. Ry.*, 17 I. C. C. 479, 487, it is said:

> Reconsignment is a privilege—not a right to be demanded by shippers—and can only be required where necessary to correct unjust discrimination.

See also *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.* 214 U. S. 297.

The theory of this privilege of reconsignment is that the shipment is in fact one shipment from point of origin to the ultimate destination, so that the privilege of reconsignment applies as of the date of the original shipment. *Wood* v. *N. Y., P & N.*, 53 I. C. C. 183.

In *Carolina Portland Cement Co.* v. *Director General,* 83 I. C. C. 388, the following appears at page 391:

> As reconsigned, the shipments became through shipments from the original shipping points to final destinations, and the applicable rates are those in effect for the through movements as of the dates of shipment from point of origin, whether joint or combination rates.

and on page 184 of the *Wood case*:

> If the rate from point of origin to ultimate destination applies as of the date of the shipment, so, too, must the right of reconsignment speak as of the date of shipment, even if the order be given subsequent.

See also *Murray* v. *Director General,* 69 I. C. C. 477, 482.

Clearly, therefore, all of the rights, privileges, and disabilities pertaining to the reconsignment attach as of the date of the original shipment, and must be determined under the facts and circumstances existing at the time the original shipment was made, unless specifically restricted or extended by the tariffs permitting the reconsignment.

It is settled that a carrier may refuse an original shipment offered to an embargoed destination (R. 63) where, as is admitted here, the embargoes are reasonable and necessary (R. 62). If a car is tendered for shipment from an original point of origin to an embargoed destination, and is refused by the carrier, demurrage is properly assessed while the car is held under load at the original point of origin.

In *Brennan Packing Company* v. *Director General*, 77 I. C. C. 307, the complainant had ordered certain cars placed for loading without stating the destination. One of the cars was actually loaded and tendered for shipment, but refused because an embargo had been placed against the destination. That car and the others which had been actually placed, but not loaded, were held under demurrage awaiting instructions from the shipper. The shipper contended that the carrier should have removed the empty cars, and that he was not liable for demurrage on the car loaded because the shipment was prevented by the embargo which was the carrier's disability. The Commission says, on page 308:

> The cars were ordered by complainant, and the carrier was under no obligation to remove them unless instructed to do so by complainant. No such instructions were given, and during the time the cars were held by complainant, they were subject to demurrage.

See also *Atlantic Refining Co.* v. *Director General,* 57 I. C. C. 627; *Duvall* v. *Director General,* 59 I. C. C. 442; *Kaw Boiler Co.* v. *Director General,* 83 I. C. C. 339; *Du Pont* v. *Director General,* 59 I. C. C. 659.

Tariffs do not specifically provide that a carrier will refuse to accept an original shipment to an embargoed destination (page 73 of Exhibit 8—the testimony before the Commission), for, as the Commission says (R. 63), the carrier's right to refuse such a shipment is governed by general principles of law well established.

Since the carrier, without any provision in its tariff, has the right, by the placing of a necessary and proper embargo, to relieve itself of its common-carrier liability to transport shipments offered, why has it not the same right with respect to a reconsignment, which attaches as of the date of the original shipment, especially as the reconsignment is not a duty imposed upon it by law, but solely a "concession voluntarily extended" to the shipper? In other words, in granting a privilege it has at least an equal right to the protection which the law gives it as when it is performing the duties imposed upon it by law as a common carrier, except to the extent it specifically by tariff waived those rights.

The embargoes themselves (Exhibit 11 to the testimony before the Commission—Exhibit 8 in the record in the District Court) by their terms prohibit reconsigning to embargoes destinations.

For example, on the first page of Exhibit 11 the embargo provides "account connecting lines embargoes Southern Railway System Lines West will not accept freight as follows for delivery to or movement via the following road, etc." This would certainly apply to a reconsigned as well as an original shipment.

Furthermore, a carrier is prohibited by law from reconsigning to an embargoed destination unless the tariff specifically permits it, because that is a special service.

It is settled that a special service can not be granted except by publication in the tariff.

In *American Paper & Pulp Association* v. *B. & O.*, 41 I. C. C. 506, the Commission condemned the practice of the carriers in giving an unlimited amount of free time for unloading at certain ports, because it was operating as a discrimination against consignees who could not avail themselves of it and was detaining the carrier's equipment unduly, stating, on page 512:

> And by Section 6 [Interstate Commerce Act] no carrier may extend "any privileges or facilities," save as these have been duly specified. But the primary duty of a carrier, is to carry. And it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading or removal.

See also the decisions of this Court in *C. & A. Ry. Co.* v. *Kirby*, 225 U. S. 155; *Davis* v. *Cornwell*,

264 U. S. 560; *Davis* v. *Henderson,* 266 U. S. 92; *C. & O. Ry.* v. *W. C. K. Co.,* 270 U. S. 260.

There is another point which must not be overlooked, and that is that for practical purposes an embargo has the effect of eliminating the embargoed point as a destination, and the situation then is just the same as if no such point of destination is named in the tariff. This is made clear by the Commission's decisions dealing with routes which have been embargoed. They are not available, and for practical purposes do not exist. In *North Packing & Provision Co.* v. *Director General,* 73 I. C. C. 749, the shippers claimed that they had been deprived of the right to route their shipments by reason of the permit system which was then in use on account of embargoes at New York. The Commission says, on page 752:

> Common carriers have the right, in order to prevent complete paralysis of their operating facilities, to protect themselves by embargo against acceptance of freight over a certain route or routes which may be congested. That right was exercised by defendants, and the embargo which affected complainants' shipments also affected all routes serving the port of New York and all export traffic intended for shipment to that port, except shipments for the United States Government and shipments as to which the embargo was lifted by special permit. A route that is embargoed against certain traffic

> can not be said to be available to shippers tendering such traffic. We have frequently construed section 15 to impose upon common carriers the duty, in the absence of contrary routing by the shipper, to forward shipments over the cheapest available route, and failing to do so, carriers have been found liable to the damaged shipper in the amount of the difference between the rate charged and the rate over the cheapest available route. But where, as here, because of congestion or other justifiable cause and consequent embargo, the route is not available, the carrier does not violate its duty if it refuses to accept the shipment until after the shipper agrees to a route that is available.

See also *Cannon Mfg. Co.* v. *Southern Ry.*, 56 I. C. C. 128, 130.

Consequently a destination is not available where embargoes are in effect, and for practical purposes it does not exist.

Furthermore, the petitioner did nothing to abate the demurrage, and hence can not recover. See *Cleveland Cooperage Co.* v. *Director General*, 57 I. C. C. 423, 425; *Lafayette Box Board Co.* v. *Director General*, 59 I. C. C. 105, 107.

Since the respondents were not required to state in their tariffs they would not reconsign to embargoed destinations, and since they can not reconsign to embargoed destinations in the absence of specific tariff provision permitting such a practice, the demurrage was legally collected during the

period of detention at the reconsigning points, and the Commission's orders are unlawful and void.

It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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WASHINGTON, D. C., *July 11, 1927.*

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 342

KRAUSS BROTHERS LUMBER CO., PETITIONER

v.

ANDREW MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

BRIEF FOR RESPONDENTS

STATEMENT

A writ of certiorari was issued in this case, the order requiring "that the argument be limited to the question of practice in respect to the Bill of Exceptions upon which the case in the Circuit Court of Appeals was made to turn."

We make our own statement because the statement of the case in the brief for petitioner does not sufficiently set forth the facts with regard to the question now before this court and is inaccurate in certain respects, particularly the statement on page 2 purporting to set out the position of respondents in contesting the order of the Commission. It may be briefly stated that our position is that on a reconsigned shipment all of the rights, duties, and liabili-

ties of the carrier and the shipper date back as of the date of the original shipment, and, hence, since the embargoes were in effect when the shipments left the original point of origin and continued in effect while the shipments were held at the reconsigning points, the carriers have the same right to assess demurrage at such reconsigned points as they would have had to assess demurrage at the original point of origin under like conditions. The Commission held the right to lay the embargoes and assess demurrage at the original point of origin is governed by well-settled principles of law, but that the rights as to reconsignment are governed by the rules in the tariffs and consequently the carriers forfeited any rights which were not specifically reserved in the reconsigning tariffs. It is obvious, therefore, that it was important that the court have before it the tariff and other portions of the record before the Commission (see Rec. page 58 and opinion, the Court of Appeals, Rec. 96) before the court can intelligently pass upon the issues. These questions are fully discussed in our brief opposing the granting of the certiorari but are not repeated here because not relevant to the point now before the court.

This is a suit to enforce an award of the Interstate Commerce Commission. To the petition filed in the District Court to enforce the order, the defendants (respondents here) filed a "plea of general issue pleaded in short by consent, with leave to give

in evidence any matter which, if well pleaded, would be admissible in defense of the action, and have effect as if so pleaded * * *." (Rec. p. 54.)

The jury found in favor of the defendants under a directed verdict (54, 79).

The Bill of Exceptions shows that defendants introduced, amongst other evidence, Exhibits 7, 8, 9, 10, and 11, which contain all of the record before the Commission, each exhibit being described in the Bill of Exceptions (58).

The concluding paragraph of the Bill of Exceptions (59) states in part:

> By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and defendants' Exhibits Nos. 7, 8, 9, 10, and 11, respectively, are omitted from the bill of exceptions in order that they may be sent by the Clerk of the lower Court in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

The Bill of Exceptions then stated, "This was all the evidence in the case" (59).

The order of the Court reads:

> It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:
>
> It is therefore ordered that the following papers to-wit: Exhibits 6 to 11, inclusive, referred to and described in the bill of ex-

ceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

The stipulation of the parties is as follows:

> The parties to this cause by their respective counsel do hereby stipulate and agree as follows:
>
> That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10, and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10, and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals.

After quoting the concluding paragraph of the Bill of Exceptions, above referred to, the order of the Court, and the stipulation of the parties, the Court states that Exhibits 6, 7, 8, 9, 10, and 11, which were before the District Court, are not included in the Bill of Exceptions and are not printed in the transcript, but that the original documents were sent up in compliance with the order, but without anything to show that they were made a part of the bill (97–98). The Court refers to its Rule 14, Paragraph 4, with regard to the

transferring of original papers from the District Court, which is similar to Paragraph 3 of Rule 9 of this Court, and says that the order transmitting the originals should not have been granted, and that Rule 14, Paragraph 4, "was never intended to permit the sending up of a mass of original documents that could have been copied in the printed record, for the purpose of saving expense" (98).

The Court concludes that all of the evidence upon which the case was tried is not in the Bill of Exceptions and consequently the exhibits sent up in original form can not be considered, and holds (99):

> Where instructions of the Court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill, the Appellate Court must presume that the omitted evidence justified the instructions. (Citing Authorities.)

The Court affirmed the judgment of the District Court (18 F. (2d) 369) on the ground that it was unable to review it because of the state of the record (99).

ARGUMENT

As the Court of Appeals suggests, and as would seem apparent from the record, the exhibits mentioned were sent up in the original form to save the cost of printing, and it was so stated to respondents

when they were asked to sign the stipulation heretofore quoted.

Obviously, since exhibits 7, 8, 9, 10, and 11 constituted practically all the respondents' testimony, they would not have consented to any stipulation which would have omitted them completely from the Bill of Exceptions and from the consideration of the Court. Furthermore, if they had not been presumed to have been incorporated, by reference at least, in the Bill of Exceptions, there would have been no purpose in sending them up in their original or any other form because, as the Court points out, they could not have been deemed to be before the court.

The record is perhaps somewhat ambiguous on the question of their inclusion in the Bill of Exceptions. Of course, they are not printed in the Bill of Exceptions, and in that sense are omitted, but if they were not to be presumed to have been incorporated by reference in the Bill of Exceptions, there would have been no object whatever in sending them up in the original form, nor of mentioning them, and the stipulation, and the order of the Court would have been useless.

Consequently, when the record is read in connection with the fact that the exhibits were actually placed before the Court of Appeals it would seem clear that the exhibits were included by reference in the Bill of Exceptions, and the court should have considered them.

The stipulation for sending up the exhibits in original form was made in good faith by the parties, respondents, at least, having understood that this practice was proper, and that the court would consider the exhibits, and the failure to print was apparently due to an honest mistake for which the petitioner ought not to be made to suffer. Therefore, if that were the contention of petitioner, respondents would interpose no objection to the Court of Appeals or this court reviewing the entire record, including the exhibits (the petitioner being required to print them or the substance of them for the record if the court deemed that necessary).

However, the position which petitioner has taken in his brief in this Court presents an entirely different question. He contends that the Exhibits were irrelevant, and consequently under Section 2, Rule 7, should have been and were omitted from the Bill of Exceptions. That Rule requires that "only so much of the evidence shall be embraced in a Bill of Exceptions as may be necessary to present clearly the questions of law involved in the ruling to which exceptions are reserved * * *." If they were omitted because of that rule, sending them up in the original form would have been as much in violation of Rule 7 as if they had been printed in the record, and would have been a useless procedure.

The Bill of Exceptions shows (58) that when the Exhibits were offered by the defendants (the

respondents here), they were objected to on the ground that they were immaterial, irrelevant, and incompetent, and the objection was overruled (59).

Obviously, therefore, respondents would never have entered into any stipulation which would have taken away from the consideration of the Appellate Court the Exhibits which constituted practically all of their evidence in the District Court.

Furthermore, the Bill of Exceptions refers to and describes these Exhibits (58). It is manifest, therefore, from the Bill of Exceptions that there was evidence which the District Court at least deemed material, because it was admitted over objection, and which was before the District Court, but which was not before the Court of Appeals. The burden was upon the petitioner to make the record, but had the respondents not understood that under the agreement and order of the Court the Exhibits were incorporated in the Bill of Exceptions by reference, and would be considered by the Appellate Court, it is clear that they would have insisted that they be included in the Bill of Exceptions and printed, for they would never have stipulated, because petitioners deemed it irrelevant, that their evidence admitted over objection should be left out.

In this case the District Court directed a verdict upon all of the evidence. Obviously, therefore, all of the evidence is necessary in order that the Appellate Court may intelligently pass upon

the action of the District Court, as the Court of Appeals correctly states, citing authorities (99):

> Where instructions of the Court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill the Appellate Court must presume that the omitted evidence justified the instruction.

Therefore, if the real reason for not printing the exhibits was that now contended for by petitioner, namely, that they were omitted in accordance with the provisions of Paragraph 2 of Rule 7 of this Court, this court must affirm the Court of Appeals because the Bill of Exceptions describes them and shows they were actually before the District Court when it directed its verdict.

However, as stated before, respondents at the request of petitioner signed the stipulation above quoted upon the statement to them that it was for the purpose of saving the cost of printing, and they understood that the rules of the Court of Appeals would permit it. They understood the entire record, including the exhibits sent up in original form, would be considered by the Court of Appeals and the case determined upon its merits. Consequently they do not now object to such action by the Court of Appeals or this Court. Their only concern is that those Exhibits should not now be held to be not before the Court under Paragraph 2 of Rule 7. Such a ruling would penalize the re-

spondents by omitting substantially all of their evidence from the record, because they had agreed to a procedure which they were advised was taken to save petitioner expense and place the entire testimony before the Court. Otherwise would not have consented.

Respectfully submitted.

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WASHINGTON, D. C. *February 24, 1928.*

In the Supreme Court of the United States

OCTOBER TERM 1927

No. 342

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

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MOTION BY RESPONDENTS TO AMEND JUDGMENT AS TO COSTS AND RETAX COSTS

Now come the respondents and, leave first having been asked and obtained, move the Court to amend the judgment in this case so as to tax the costs in this Court against the petitioner instead of against the respondents, for the reason that the Writ of Certiorari was granted to consider a question of practice which arose because of the manner in which the record in the Circuit Court of Appeals was prepared by petitioner and for which the petitioner was solely and entirely responsible.

The opinion of this Court rendered April 9, 1928, does not state that costs will be assessed against respondents, but we understand that under paragraph 3 of Rule 29 the costs will be assessed against respondents in the absence of a ruling by the Court

to the contrary, the judgment of the Court of Appeals having been reversed.

This case was brought in the District Court to enforce an order of the Interstate Commerce Commission against respondents[1] for $10,365, demurrage charges, alleged to have been illegally collected.

The District Court directed a verdict in favor of the respondents. (R. 79.) The duty of preparing the record for the Court of Appeals, therefore, rested primarily upon petitioner. In order to avoid the cost of printing certain exhibits (see page 2 of the opinion of this Court, and the opinion of the Court of Appeals, R. 98) petitioner requested respondents to stipulate that certain exhibits should be sent up to the Court of Appeals in original form, which was done (R. 59, 80, 82). One of those exhibits was a part of petitioner's evidence. At no time did petitioner ask respondents to acquiesce in any other method of preparing the record. Respondents have never questioned this procedure nor sought to take advantage of the manner in which the record was made up.

"The Circuit Court of Appeals, of its own motion, and not by request or consent of either party"

[1] The opening paragraph of the opinion of this Court states that the Commission ordered the Mobile & Ohio Railroad and the Alabama Great Southern Railroad Company to pay the reparation. The orders are against the Director General of Railroads as well as the two railroad companies named (Rec., pp. 65–69, 76), the greater portion of the reparation being against the Director General of Railroads (Rec., 57, 66, 76).

(see page 4 of this Court's opinion), held that the matter sent up in the original form was not a part of the Bill of Exceptions and could not be considered by it, and consequently affirmed the judgment of the District Court, applying the rule that where the Bill of Exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify the action of the Court in directing the verdict.

Petitioner then applied to this Court for a Writ of Certiorari, which was granted, with the order that the argument be limited to the question of practice in respect to the Bill of Exceptions upon which the case in the Court of Appeals was made to turn. (R. 102.) Reference to respondents' brief opposing the Writ of Certiorari (pages 3 *et seq.*) will show that objection to granting the Writ was based solely on the merits of the case and not upon the state of the record. Respondents' brief filed in this Court after the granting of the certiorari shows (pages 5, 7, 9) that again respondents made no objection to the manner in which the record was prepared, but opposed petitioner only on his contention that the exhibits had been omitted because irrelevant, and it was distinctly stated by respondents that they did not oppose a review by the Court of Appeals of the case on the merits on the entire record, as they understood that the exhibits had not been printed in order to save the petitioner the cost of so doing.

At the oral argument in this Court respondents again stated that they had no objection whatever to the Court of Appeals considering the case on its merits on the entire record; that they had briefed and argued the case to the Court of Appeals upon the entire record which they understood was before it, and that the only opposition that respondents made to the petitioner's argument in this Court was to the contention that the exhibits referred to had been omitted from the Bill of Exceptions in accordance with paragraph 2 of Rule 7 of this Court, because irrelevant.

In other words, throughout this case respondents not only have not opposed the method in which petitioner prepared the record, but have actually cooperated with him in every way, as far as they have been requested, in the preparation of the record in an effort to save the petitioner the cost of printing evidence, some of which was his own, and the remainder of which was introduced and admitted by the Court over objection that it was irrelevant.

It is manifestly unjust, therefore, that respondents should now be penalized by being required to pay the costs of bringing the case up to this Court on certiorari on the question of practice which arose entirely because of petitioner's method of preparing his record.

It is respectfully requested, therefore, that the judgment rendered April 9, 1928, be amended so as to tax against the petitioner, and not against

respondents, the costs accruing in connection with the Writ of Certiorari granted October 24, 1927.

Respectfully submitted.

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WASHINGTON, D. C., *April 18, 1928.*

CERTIFICATE OF COUNSEL

I hereby certify that I have prepared the foregoing Motion, and in my opinion it is well founded, and it is not interposed for delay.

ALEX. M. BULL,
Of Counsel for Respondents.

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